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No. 06-127

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FREEEATS.COM, INC.,

Petitioner,

v.

STATE OF NORTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTRODUCTION[1]

Since 1934 the Federal Communications Commission ("FCC") has regulated interstate telecommunications while the States generally have had intrastate authority. *See City of New York v. FCC*, 486 U.S. 57 (1988). In the Telephone Consumer Protection Act of 1991 ("TCPA"), Congress authorized the FCC to regulate both interstate and intrastate telemarketing calls but specified, 47 U.S.C. § 227(e)(1), that the Act and implementing federal regulations would

> [not] preempt any State law *that imposes more restrictive intrastate requirements or regulations on, or which prohibits,* – (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations. (emphasis added)

An increasing number of States interpret the italicized language to mean that, although States may not impose "requirements or regulations" on interstate calls, they may "prohibit" interstate calls authorized by the FCC. North Dakota law punishes calls using "an automatic dialing-announcing device unless the subscriber has knowingly requested [it] or the message is immediately preceded by a live operator [or the call is] from a public safety agency ... a school district to a student, a parent, or an employee..." N.D. Cent. Code § 51-28-02 (2006). North Dakota applied this law to severely punish an automated interactive political poll conducted from Virginia, a type of interstate communication approved by the FCC. *See North Dakota ex*

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1. All parties have consented to the filing of this brief *amicus curiae* as indicated by letters of consent filed with this Court. This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828 (2006).

The legal question thus is, did the North Dakota Supreme Court err in holding that, although the TCPA allows States to impose "requirements or regulations" only on intrastate calls, its plain language allows States to "prohibit" interstate calls authorized by FCC regulations. This brief contends that the North Dakota court did err, that there are compelling practical and constitutional reasons to correct that error promptly, and that only this Court is positioned to do so efficiently. Thus, the Petition for Certiorari should be granted.

INTEREST OF THE AMICUS

Interstate telecommunications are vital to American (and global) business. Exclusive federal regulation of the manner and means of interstate calling has provided essential uniformity. *See City of New York.* The FCC determined, after extensive public notice and comment, that some automated or pre-recorded telecommunications encompassed by the TCPA are socially desirable and constitutionally protected.[2] However, the challenged ruling of the North Dakota Supreme Court holds that a cryptic phrase in TCPA – "or which prohibits" – gives States broad new authority to prohibit such federally authorized interstate calls. *See North Dakota ex rel. Stenehjem v. FreeEats.com, Inc.*, 2006 ND 84, 712 N.W.2d 828 (2006). That legally erroneous holding threatens a uniform interstate regulatory structure that has worked well and jeopardizes important economic and constitutional interests of America's business community.

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2. *See* 47 C.F.R. § 64.1200; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752 (1992); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14,014 (2003) ("*2003 TCPA Report and Order*").

The Chamber of Commerce of the United States of America ("Chamber"), founded in 1912, is the world's largest not-for-profit business federation with an underlying membership of over 3,000,000 businesses and business associations. The Chamber's members include businesses of all sizes and sectors - from large Fortune 500 companies to home-based, one-person operations. Ninety-six percent of the Chamber's membership are businesses with fewer than one hundred employees. Collectively, the Chamber's members are central to our nation's economy and well-being.

A key function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive branches of State and federal governments. In particular, the Chamber has been active concerning the proper scope of federal preemption in regulating interstate commerce. For example, the Chamber was the lead plaintiff in obtaining a declaratory judgment that the TCPA preemption provision at issue here does *not* grant States authority over interstate telecommunications. *Chamber of Commerce of the United States v. Lockyer*, No. 2:05-CV-2257, 2006 U.S. Dist. LEXIS 8234 (E.D. Cal. Feb. 27, 2006) (declaring preempted California's ban on business faxes to persons with a prior business relationship).

Interstate telecommunications of the type TCPA regulates are vital to the Chamber's membership. In 2003, the Federal Communications Commission reported that the telemarketing industry is considered the single largest direct marketing system in the country, accounting for $600 billion in annual sales.[3] The Commission noted that many consumers value the savings and convenience telemarketing provides.[4] In addition, the telemarketing

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3. *2003 TCPA Report and Order*, 18 FCC Rcd. at 14,021-022 (¶ 8) (citing Direct Marketing Association statistics).

4. *Id.* at 14,018 (¶ 3).

industry employs millions of Americans, providing regular, flexible jobs to some of our nation's most economically vulnerable.[5] Moreover, as this case illustrates, the technologies regulated by the TCPA, and threatened by increasing State burdens, extend far beyond telemarketing to core First Amendment speech; e.g. political polling.

The threat to uniform federal regulation of interstate telecommunications posed by the challenged ruling thus is of vital concern to the Chamber's membership and justifies submission of this brief *amicus curiae.*

SUMMARY OF ARGUMENT

Certiorari is justified by the importance of the issue and this Court's unique institutional role in our federal system. State and federal regulation of *interstate* telephone calls using automated and pre-recorded technology have tangled into a knot that only this Court can slice, providing a ruling that both States and federal authorities must accept and restoring the uniformity that has prevailed for decades and that TCPA intended to preserve.

Matters did not have to reach this unfortunate pass. Years ago the FCC recognized that "any state regulation of interstate telemarketing calls that differs from our [TCPA] rules almost certainly would be in conflict with and frustrate the federal scheme and almost certainly would be preempted."[6] And the agency promised "any party that

5. Teleservices jobs employ millions of working mothers, minorities, persons with disabilities, students, part-time workers and residents of rural communities. *See* the Comments of the Direct Marketing Association, Inc. and the U.S. Chamber of Commerce before the Federal Trade Commission, Proposed Amendments to the Telemarketing Sales Rule, FTC File No. R411001, at 5 (Apr. 15, 2002) (citing a WEFA Group Study, *Economic Impact, U.S. Direct and Interactive Marketing Today, 2002 Forecast* and surveys conducted by the DMA), *available at* www.the-dma.org/government/commentsdmauscc.pdf (last visited Aug. 25, 2006).

6. *2003 TCPA Report and Order*, 18 FCC Rcd. at 14,064 (¶ 84).

believes a state law is inconsistent with Section 227 or our rules may seek a declaratory ruling from the Commission."[7] However, as such petitions were filed, the FCC responded with profound paralysis.[8] In the meantime, States have increasingly committed to such regulation.

A dozen States now purport to govern interstate telecommunications subject to the TCPA.[9] The North Dakota and Utah Supreme Courts now have held that TCPA plainly gives States that power. *See North Dakota ex rel. Stenehjem v. FreeEats.com, Inc.*, 2006 ND 84, 712 N.W.2d 828 (2006);

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7. *Id.*

8. *See* Petition for Declaratory Ruling by TSA Stores, Inc., CG Docket No. 02-278 (filed Feb. 1, 2005) (addressing Florida law); Petition for Expedited Declaratory Ruling by National City Mortgage Co. ("NCMC"), CG Docket No. 02-278 (filed Nov. 22, 2004) (addressing Florida law); Petition For Declaratory Ruling of The Consumer Bankers Association ("CBA"), CG Docket No. 02-278 (filed Nov. 19, 2004) (addressing Wisconsin law); Petition of CBA, CG Docket No. 02-278 (filed Nov. 19, 2004) (addressing Indiana law); Petition for Declaratory Ruling by American Teleservices Association, Inc. ("ATA"), CG Docket No. 02-278 (filed Aug. 24, 2004) (addressing New Jersey law); Petition for Declaratory Ruling by Mark Boling, CG Docket No. 02-278 (filed Aug. 11, 2003) (addressing California law). *See also* Verizon Comments in Support of Petition for Declaratory Ruling by ATA, CG Docket No. 02-278 (filed Nov. 17, 2004) (addressing New Jersey law) (for the convenience of the Court, all of the foregoing documents are available electronically on the FCC Electronic Comments Filing System ("ECFS") by typing in the names of the parties, the FCC docket number and the date of filing *at* http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi).

9. *See, e.g.*, Alaska Stat. § 45.50.475 (2006); Ariz. Rev. Stat. §§ 13-2919, 44-1278(B)(4) & (5) (2006); Colo. Rev. Stat. §§ 18-9-311, 6-1-302(2)(a) (2005); Fla. Stat. § 501.059 (2006); Ga. Code Ann. §§ 46-5-23 & 24 (2006); Ind. Code 24-4.7-1-1(2006); La. Rev. Stat. Ann. § 45:844.12(6)(c)(2006); Mich. Comp. Laws Ann. § 445.111(j); Minn. Stat. § 325E.27 (2005); Mo. Rev. Stat. § 407.1095(3)(b) (2006); Mont. Code §45-8-216 (2005); N.C. Gen. Stat. § 75-104 (2006); N.D. Cent. Code § 51-28-02 (2006); N.H. Rev. Stat. § 359-E:1(2006); N.M. Stat. Ann. § 57-12-22 (2006); N.J. Stat. Ann. § 56:8-119 (2006); Tex. Util. Code Ann. § 55.126 (2006); and Wis. Stat. § 100.52 (2006). In some of these States, the regulatory authorities have not yet formally confirmed their intent to apply the broad statutory language to *interstate* calls, but the threat is clear.

Utah Div. Consumer Prot. v. Flagship Capital, 2005 UT 76, 125 P.3d 894 (2005). In a case that involved *intrastate* communications, the Eighth Circuit used broad language that appears to support those decisions. *Van Bergen v. Minnesota*, 59 F.3d 1541, 1555 (8th Cir. 1995). On the other hand, the *Lockyer* district court ruled that the TCPA did not grant the States authority over interstate calls.

At this point, if the FCC were to begin declaring State laws invalid – and there is no indication it has the stomach to do so – lengthy and unpleasant federal/State conflict would ensue as State courts grappled with the effect on State law of federal agency declarations they deem contrary to plain Congressional command. Business would be caught in the middle. Types of speech that the FCC found desirable – after notice and extensive comment – would be deterred and both economic and First Amendment interests would suffer. For example, the type of automated interactive political poll at issue here either will not be taken or will be much more costly.[10]

Litigation in the lower federal courts will be similarly prolonged, inefficient, and disruptive. State courts are not bound to follow precedent from federal district courts or courts of appeals except where (e.g., under *Ex Parte Young*, 209 U.S. 123 (1908)) the State is effectively a party. The *Lockyer* declaratory judgment the Chamber recently obtained from a federal district court in California was shrugged off in a single sentence by the North Dakota Supreme Court. *FreeEats.com, Inc.*, 712 N.W.2d at 841. Thus, if this Court declines review, the result will be multiple lawsuits against the States in multiple district courts over a period of years.

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10. It should be noted that this poll and many other types of speech burdened by the State/federal conflict at issue here are not "commercial speech" that some precedent gives reduced protection but, instead, are core First Amendment speech, entitled to the highest level of constitutional protection. Although petitioner is a for-profit business, so is the New York Times. Assuming that the First Amendment allows the general type of regulation at issue here, the speech burdens should be minimized by preserving interstate uniformity.

Only this Court now can settle the issue efficiently – and it can do so with limited burden to itself. Federal regulation of interstate telecommunication is a firmly established background principle. There is no room for a presumption against federal preemption in this field. To the contrary, the presumption should be in favor of exclusive federal regulation of the manner and means of interstate calls. The language of the TCPA permits, and the Federal Communications Act of 1934 as a whole favors, applying that presumption here.

The North Dakota court's belief that TCPA explicitly authorizes States to regulate interstate calls is plain error. The TCPA preemption provision never uses the word "interstate," but speaks only of "intrastate" restrictions. The modifier "intrastate" precedes a series of elements – requirements, regulations, and prohibitions. The general tendency is to apply such a modifier to each element of the series. Nothing in the language or structure of the provision excludes such a reading, though the phrasing is awkward.

Moreover, the nature of the statutory language is inconsistent with an intent to draw a jurisdictional line, which is how the North Dakota court interprets it. TCPA is explicit that the State may impose only *intrastate* "requirements and regulations." If North Dakota were right that it may impose *interstate* prohibitions, then the jurisdictional line would be defined by the terms "requirements and regulations" on one side and "prohibitions" on the other. Yet these terms substantially overlap, and since virtually any requirement or regulation can be given the form of a prohibition, the line drawn would be illusory, and the limitation of the States to intrastate regulations and requirements would serve no function.

Thus, the language and structure of the TCPA do not compel the reading adopted by the North Dakota court but, to the contrary, suggest an intent to preserve the States' historic power to impose more stringent restrictions on

intrastate calls, up to and including prohibiting them. That surely permissible reading accords with the long-standing background principle of exclusive federal regulation of the manner and means of interstate calls. And, if doubt remained, it would be removed by the legislative history, which shows no hint of any intent to grant new interstate authority to the States and, instead, emphasizes the need for interstate uniformity, as the FCC has found.

With a very limited investment of its time and resources, this Court can and should correct an obvious misreading of the TCPA and restore the federal primacy over interstate telecommunications that, since 1934, has provided the conditions for rapid economic and technical development and free communication.

ARGUMENT

Compelling practical considerations undergird the long-settled background principle of exclusive federal jurisdiction over *interstate* telecommunications. TCPA's preemption provision can and should be read as fully consistent with that principle. The North Dakota Supreme Court's holding that the plain language of TCPA expressly allows States to prohibit – but not impose requirements or regulations on – interstate calls authorized by the FCC gives a false clarity to the federal statute and creates serious practical and conceptual difficulties that Congress did not intend.

I. COMPELLING PRACTICAL CONSIDERATIONS LED CONGRESS TO MANDATE EXCLUSIVE FEDERAL JURISDICTION OVER INTERSTATE TELECOMMUNICATION

Since the Federal Communications Act of 1934 ("Communications Act" or "Act"), Congress has committed exclusive jurisdiction to regulate *interstate* communications to the Federal Communications Commission ("FCC"), while, with some exceptions, giving the States exclusive

jurisdiction to regulate *intrastate* communications. 47 U.S.C. § 152. (The exception relevant here is that, in the TCPA, Congress gave the FCC jurisdiction to regulate certain intrastate telemarketing communications under Section 227 of the Act, *see id.* § 152(b)). In this way, the Act generally "divide[s] the world... into two hemispheres - one comprised of interstate service, over which the FCC [has] plenary authority, and the other made up of intrastate service, over which the States ... retain exclusive jurisdiction." *Louisiana. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986); *City of New York v. FCC*, 486 U.S. 57, 66-70 (1988); *United States v. Locke*, 529 U.S. 89, 115-16 (2000). Within this regime, the historic understanding is that "[i]nterstate communications are *totally entrusted* to the FCC." *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (citation omitted and emphasis added). Certainly there is no historic expectation that States may disapprove means and methods of interstate communication that the FCC has reviewed and approved.

This settled background principle of communications law grows from compelling practical considerations that were recognized in connection with the TCPA itself. Faced with intrusive interstate telemarketing practices that the FCC had not regulated, the States had begun efforts to regulate. The resulting disjointed legal landscape created a "national problem" requiring "federal intervention balancing the privacy rights of the individual and the commercial speech rights of the telemarketer." H.R. Rep. No. 102-317, at 10 (1991). Such inconsistent State rules "frustrate the federal objective of creating uniform national rules" and impose "burdensome compliance costs for telemarketers and potential consumer confusion." *2003 TCPA Report and Order*, 18 FCC Rcd. at 14,064-065 (¶ 84). Congress enacted the TCPA to "protect legitimate telemarketers from having to meet [States'] multiple legal standards." H.R. Rep. 102-317, at 10.

As States such as North Dakota have encroached on the FCC's authority over interstate communications,

prohibiting calls the FCC has approved, the very problems that exclusive federal jurisdiction was designed to prevent have sprouted up. Petitions to the FCC calling for preemption report mounting legal confusion, spiraling costs of systems and training in order to comply with State laws that deviate from FCC rules but that are applied across State lines,[11] high risk of unavoidable error due to the complexities of compliance with balkanized State laws,[12] the inevitable risks of legal liability under State law, and the costs of defense potentially in fifty State courts.[13]

11. *See, e.g., In the Matter of Consumer Bankers Association, Petition for Expedited Declaratory Ruling with respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code,* Consumer Bankers Association, Petition for Declaratory Ruling [sic] at 5, CG Docket No. 02-278 (filed Nov. 19, 2004) ("In order to comply with both federal and Indiana law, each of the CBA's members would be required to identify those Indiana customers with whom the member's relationship satisfies this Commission's, but not Indiana's, standards for permitting a telemarketing call to a number on the do-not-call list. Each member then would be required to compile a separate 'do-not-call list' for those Indiana customers and train and supervise call center employees in its use. This costly and cumbersome effort would frustrate the Commission's announced policy of avoiding 'inconsistent rules for those that telemarket on a nationwide or multi-state basis' that create 'a substantial compliance burden for those entities.'").

12. *See, e.g., In the Matter of American Teleservices Association, Inc., Petition for Declaratory Ruling with respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code,* Consumer Bankers Association, Comments in Support of the Petition for Declaratory Ruling at 4-5, CG Docket No. 02-278 (filed Nov. 17, 2004) ("CBA members that wish to comply fully with the New Jersey requirements must [maintain separate scrubbing protocols and calling scripts and reprogram screen prompt systems], thereby incurring greater compliance expenses and risks.").

13. *See, e.g., In the Matter of American Teleservices Association, Inc., Petition for Declaratory Ruling with respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code,* Reply Comments of the American Teleservices Association at 8, CG Docket No. 02-278 (filed Dec. 2, 2004) ("The most troubling aspect of the litany of inconsistent state restrictions is the risk that attorneys' general will initiate enforcement proceedings based upon their over-restrictive regulations and force telemarketers to defend themselves one-by-one in various state courts...The threat of litigation by attorneys general ultimately translates into reverse preemption by the states.").

Ultimately, Petitioners report, they must deal with the costs of simply not making calls.[14] This result was not the intent of Congress, which found that "commercial freedoms of speech and trade" were important interests and "legitimate telemarketing practices" should be permitted. Telephone Consumer Protection Act, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394 (1991) (S. 1462).

In short, in enacting the TCPA, Congress was not writing on a blank slate. To the contrary, it was legislating in a field with a long history of federal regulation and in which exclusive federal regulation of the means and methods of interstate telecommunication had become a settled background principle. Moreover, it was acting to preserve uniform federal interstate standards. *See 2003 TCPA Report and Order*, 18 FCC Rcd. at 14,064-065 (¶ 84).

II. THE PREEMPTION PROVISION MUST BE READ IN ACCORDANCE WITH THE STRUCTURE, PURPOSE AND HISTORY OF THE TCPA, WHICH REQUIRE EXCLUSIVE FEDERAL JURISDICTION OVER INTERSTATE CALLS

The North Dakota Supreme Court gave no weight to the long history of federal jurisdiction over interstate telecommunications or to the peculiarity of a rule permitting States to prohibit what they cannot otherwise restrict. It believed the TCPA "explicitly stat[ed]" States were free to "prohibit" interstate calls and that this "plain language" was not so utterly absurd as to admit variance. *FreeEats.com, Inc.*, 712 N.W.2d at 837, 840. It further ruled that, if textual ambiguity had existed, the presumption in favor of State authority would require that it be resolved against preemption.

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14. *See, e.g., id.* at 9 ("The impracticality of a state-by-state approach is thus clear – telemarketers will ultimately have to defend themselves in fifty (50) state courts if they can afford to do so. If they cannot, they will be forced to cease initiating calls into states with restrictions that conflict with the Commission's Rules.").

These rulings are erroneous. They misconstrue the admittedly awkward language of TCPA's preemption provision, ignore important structural guidance, and undervalue both the background principle of exclusive federal authority over interstate calls and the oddity of authorizing prohibition but not regulation. The language of the TCPA's preemption provision, in itself, says nothing explicit about interstate calls, and the nature and structure of the provision and the Act favor a reading that preserves the States' broad traditional power to regulate or ban intrastate calls while preserving federal interstate exclusivity. That textural reading is further confirmed by the background principle against which Congress legislated and the TCPA's legislative history.

A. The Language of The Preemption Provision Is Best Read To Preserve The States' Authority To Restrict Or Ban Intrastate Calls Without Granting Them New Authority Over Interstate Calls

The North Dakota court mistakenly described TCPA as "explicitly stating that such state laws [prohibiting certain classes of interstate calls] are *not* preempted." *FreeEats.com, Inc.*, 712 N.W.2d at 837 (emphasis in original). In fact, the word "interstate" does not appear anywhere in TCPA's preemption provision. Instead, TCPA protects from preemption a State law "that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits" certain telecommunications approved by federal law. 47 U.S.C. § 227(c)(1) (emphasis added). The supposed explicit grant of interstate authority relied on by the North Dakota court actually was an inference from the placement of the word "intrastate." That inference was not the only or, indeed, the most plausible way to read the provision's language, much less the Act as a whole.

In the English language, how modifiers affect following elements typically is a matter of judgment guided by expectation and context, linguistic and factual. An initial

modifier "will tend to govern all elements in [a] series." *The Am. Heritage Bk. of Eng. Usage*, ch. 2, p.10 (Houghton Mifflin, 1996); see *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 554, 7 Cal. Rptr. 3d 844 (Cal. Ct. App. 2003) ("Most readers expect the first adjective in a series of nouns or phrases to modify each noun or phrase in the following series"); *United States Fid. & Guar. Co. v. Fireman's Fund Ins. Co.*, 896 F.2d 200, 203 (6th Cir. 1990) (it is reasonable to construe the phrase "negligent acts, errors, or omissions" to require that all elements be negligent).

But a wide range of other considerations may control. For example, if a restaurant review refers to "fried green tomatoes, plantains, and yams," the "fried" likely modifies three foods since all often are cooked by frying, but "green" likely does not, since "green yams" would be an empty set. An infinite variety of examples may be invented.

In the TCPA's preemption provision, the modifier "intrastate" is followed by and typically thus would modify three elements - requirements, regulations, and prohibitions. However, the elements are not precisely parallel. This lack of parallelism could reflect a difficulty with prepositions: requirements or regulations typically are imposed "on" an object, while a prohibition usually is "of" an object. But it also could be an effort to signal a separation, making it less likely that the modifier "intrastate" would affect "which prohibits."

The text is further clouded because the phrase concerning prohibition is introduced by "which," while the prior phrase concerning requirements and regulations begins with "that." This difference makes it more difficult to read "which prohibits" as parallel to and independent of the "that imposes" phrase. Indeed, "which" is being "used as a relative pronoun in a clause that provides additional information about the antecedent." *Webster's II New College Dictionary*, 1257 (Kaethe Ellis ed., Houghton Mifflin 1995).

So viewed, "which prohibits" provides more information about the intrastate restrictions dealt with in the previous clause, making clear that the regulation may go so far as to prohibit. But that reading, in turn, is weakened because the plural antecedent ("requirements and regulations") should have produced "which prohibit," not "which prohibits." In short, the bare language of the preemption provision itself does not have a single explicit meaning but calls for further construction.

The nature of the key statutory terms offers important guidance. Requirements, regulations, and prohibitions are closely related concepts, and it can be difficult to distinguish among them. For example, the North Dakota statute at issue, § 51-28-02, allows automatic dialing-announcing devices to be used where: [1] "the subscriber has knowingly requested, consented to, permitted, or authorized" it; or [2] "the message is immediately preceded by a live operator who obtains the subscriber's consent;" or [3] the message is "from a public safety agency notifying a person of an emergency;" or [4] the message is "from a school district to a student, a parent, or an employee;" or [5] the message is "to a subscriber with whom the caller has a current business relationship;" or [6] the message is "advising an employee of a work schedule." The North Dakota court treated this provision as one that prohibits, but it easily could be said to regulate or impose requirements.

Simply stated, it is implausible that Congress would use a series of such overlapping terms to draw a jurisdictional line, confining States to intrastate requirements and regulations but allowing interstate prohibitions. It is much more likely Congress would use a series of such terms to make clear the comprehensive intrastate authority retained by the States: they may impose requirements and regulations up to and including a prohibition on intrastate communications subject to the TCPA. Importantly, this is not an argument that plain statutory text must be set aside to avoid an absurd meaning. *See Church of the Holy Trinity v. United States*, 143 U.S. 457,

459 (1892). Instead, the point is that the nature of the text itself strongly suggests the intended meaning.

Structural analysis points in the same direction. A provision that merely preserves the status quo may well be fairly laconic. On the other hand, a provision intended to work a significant change that is at odds with the general structure of the statute is likely to be more specific.

Congress "does not, one might say, hide elephants in mouse holes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468, (2001); *Gonzales v. Oregon*, 126 S. Ct. 904, 921 (2006); *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.") Before the TCPA was adopted, States had the authority to restrict, regulate, and prohibit intrastate calls of the type TCPA governs, and many had done so. *See* S. Rep. No. 102-178, at 3 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1970 (S. 1462) (finding that over forty States had enacted telemarketing legislation). This authority flowed from the overall structure of the Communications Act. From a structural perspective, then, the insertion of the cryptic phrase "or which prohibits" into a sentence that does not use the term "interstate" but, instead, speaks only of "intrastate" authority is not consistent with an intention to grant the States new interstate authority. Instead, such a structure is more consistent with preserving the status quo.

In sum, the TCPA preemption provision does *not* plainly grant States the authority to ban interstate calls that the federal government has approved. Instead, when attention is paid to the text and structure of the provision and the Act as a whole, the meaning is that only the States' intrastate authority is preserved.

B. The Background Principle Of Exclusive Federal Jurisdiction Over Interstate Telecommunication Confirms The Statutory Meaning

The TCPA was not enacted in a vacuum, but is part of a complex regulatory system Congress developed over the decades. For compelling practical reasons, a background principle of U.S. communications law has been federal regulation of interstate telecommunication.[15] The principle is not invariant, but it has persisted, worked well, and been widely accepted. This background principle has a dual significance.

First, the North Dakota court was mistaken in its view that a presumption against federal pre-emption required any ambiguity in TCPA to be resolved to favor State authority over interstate calls. This Court has been explicit that no such presumption is warranted "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000); *see Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). Beyond doubt there has been a history of significant federal involvement in regulating interstate telecommunication.

Second, because federal regulation of interstate telecommunication is not merely significant but general, pervasive, and of long-standing, the presumption actually runs the other way. Although Congress can deviate from such background principles, it is unlikely to do so casually, and that probability shapes this Court's statutory construction. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70-71 (1994) (collecting authority). For example, the

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15. *See, e.g., Cavalier Tel., LLC v. Verizon Va., Inc.*, 330 F.3d 176, 186 (4th Cir. 2003), *cert. denied*, 540 U.S. 1148 (2004) ("The FCC has the responsibility of coordinating the national telecommunications market"); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 704 (1984) (preempting a State regulation that "plainly reaches beyond the regulatory authority reserved to local authorities by the [Communications Act], and trespasses into the exclusive domain of the FCC.").

"background principle" that evil intent is an essential element of most serious crimes will lead this Court to reject "the most grammatical reading" of a statute, even though that stringent reading poses no "constitutional problems." *Id.* at 69-71 (1994) (collecting authority); *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978) ("more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement").[16]

Similarly here, the presumption should be that Congress intended to preserve the background principle of exclusive federal regulation of interstate calls. That presumption strongly confirms the reading just discussed. Indeed, Congress should not be understood to have suddenly and inexplicably changed its long-standing practice without much clearer indications than any fair reading of the preemption provision could provide.

C. The Legislative History Removes Any Doubt

If any substantial doubt remained, it would be eliminated by the TCPA's legislative history. *See, e.g.*, S. Rep. No. 102-178, at 3 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1970 (S. 1462) (a *federal* response to abusive interstate calling was deemed necessary "[b]ecause States do not have jurisdiction over interstate calls."). Congress found that "Federal law is needed to control residential telemarketing practices" for the particular reason that "telemarketers can evade [State] prohibitions through interstate operations." Telephone Consumer Protection Act, Pub. L. No. 102-243, § 2(7), 105 Stat. 2394 (1991) (S. 1462).

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16. In *X-Citement Video*, Justices Scalia and Thomas dissented, stating that a background principle could not be employed to give a statute a meaning "its language simply will not bear" unless a scrivener's error was "absolutely clear." *X-Citement Video*, 513 U.S. at 80 (Scalia, J. and Thomas., J., dissenting). They did not question, however, that such a principle may guide the resolution of ambiguity.

As important as these affirmative statements are, there is an equally important silence. If Congress had intended to break with the long-standing background principle of exclusive federal regulation of interstate calls, it surely would have said so. The failure of the hound to bay is, in this case, persuasive evidence that there was no hound. The reason Congress never mentioned giving the States new authority to prohibit interstate communications approved by the FCC is that is had no such intent.

This legislative history, clear enough in its own right, need not be read de novo. The FCC, the expert agency entrusted by Congress to implement the statute, has already closely examined this history, weighed the evidence, and come to a firm conclusion. The Commission found that the "clear intent of Congress" was to "promote a uniform regulatory scheme," and accordingly, State regulation of interstate telemarketing calls that differs from the FCC's rules would "almost certainly . . . conflict with and frustrate the federal scheme and almost certainly would be preempted." *2003 TCPA Report and Order*, 18 FCC Rcd. at 14,064-065 (¶¶ 83-84). An expert agency may reasonably be expected to understand the legislative intent behind amendments to its core statutory authority, and its reasoned assessment deserves some weight.

* * *

As demonstrated above, there are good textual and structural reasons to construe the awkward language of TCPA's preemption provision to preserve the States' traditional broad power to impose requirements and regulations, including prohibitions, on intrastate calls. Any remaining ambiguity can and should be resolved to preserve the strong background principle favoring exclusive federal regulation of interstate telecommunications. This is doubly so since the legislative history stresses the need for a federal solution and does not even hint that States were being granted the new power to overrule the FCC with respect to interstate calls.

CONCLUSION

This petition presents a single, pure issue of federal law that is important to the U.S. economy and that only this Court can efficiently resolve. *Certiorari* should be granted.

Respectfully submitted,

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